FILED
SEP 8 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 05-1567

In the Supreme Court of the United States

MYRNA GREGORIA OCHOA-CARRILLO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that, under the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, petitioner's habeas corpus challenge to the reinstatement of a previous removal order should be transferred to the court of appeals and treated as a proceeding on a petition for review.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Fernandez-Vargas v. *Gonzales*, 126 S.Ct. 2422 (2006) ... 7
Ramirez-Molina v. *Ziglar*, 436 F.3d 508 (5th Cir. 2006) 8

Statutes and regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1182(a)(6)(C) 1, 3
8 U.S.C. 1182(a)(7) 1
8 U.S.C. 1225(b)(1) 1, 3, 5, 6, 7, 8
8 U.S.C. 1231(a)(5) 2, 3, 5, 6, 7, 8
8 U.S.C. 1252(a) 2
8 U.S.C. 1252(a)(1) 3, 5, 6, 7
8 U.S.C. 1252(a)(2)(D) 8, 9
8 U.S.C. 1252(d) 7
8 U.S.C. 1252(e)(2) 3, 5, 6, 7

Statutes and regulations—Continued: Page

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 2
§ 106(a)(1), 119 Stat. 310 (8 U.S.C. 1252(a)) 2, 9
§ 106(c), 119 Stat. 311 ..... 2, 5
8 C.F.R.:
Section 241.8(a) 2
Section 241.8(a)(2) 2

In the Supreme Court of the United States

No. 05-1567

MYRNA GREGORIA OCHOA-CARRILLO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 446 F.3d 781. A related opinion of the court of appeals (Pet. App. 5-14) is reported at 437 F.3d 842.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2006. The petition for a writ of certiorari was filed on June 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for the expedited removal without a hearing of any alien determined by an immigration officer to be inadmissible under 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7). 8 U.S.C. 1225(b)(1). The

INA also provides for the reinstatement of a prior removal order against an alien who illegally reenters the country after having previously been removed under the prior order. 8 U.S.C. 1231(a)(5). In that situation, the "prior order of removal * * * is not subject to being reopened or reviewed." *Ibid.* Under regulations implementing the reinstatement provision, an immigration officer determines whether the alien has been subject to a prior removal order and whether the alien is in fact the alien who was previously removed. 8 C.F.R. 241.8(a). The regulations provide that, in cases of disputed identity, verification that the alien is the alien who was previously removed is to be made by a comparison of fingerprint evidence. 8 C.F.R. 241.8(a)(2).

b. On May 11, 2005, the President signed into law the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302. The REAL ID Act largely eliminates habeas corpus jurisdiction to review orders of removal, and prescribes that the sole and exclusive means of obtaining judicial review of orders of removal ordinarily is by way of a petition for review in the appropriate court of appeals. REAL ID Act § 106(a)(1), 119 Stat. 310 (amending 8 U.S.C. 1252(a)). For a habeas case that was pending in the district courts on the date of enactment and that is subject to the REAL ID Act's elimination of habeas corpus review, the REAL ID Act mandates that the case be transferred to the appropriate court of appeals and treated as a proceeding on a petition for review. REAL ID Act § 106(c), 119 Stat. 311.

The sole exception to the REAL ID Act's elimination of habeas corpus review of orders of removal (and to the corresponding exclusivity of judicial review by way of a petition for review) concerns removal orders entered pursuant to expedited procedures without a hearing un-

der 8 U.S.C. 1225(b)(1). See 8 U.S.C. 1252(a)(1) and (e)(2). With respect to removal orders entered under 8 U.S.C. 1225(b)(1), the INA provides for judicial review through habeas corpus proceedings, but subject to certain limitations on the scope of review. 8 U.S.C. 1252(e)(2).

2. On March 2, 1998, petitioner, who was then using the name Ivette Treviso-Frias, made a false claim of United States citizenship in violation of 8 U.S.C. 1182(a)(6)(C). The government issued a removal order against petitioner pursuant to the expedited procedures provided for by 8 U.S.C. 1225(b)(1), and petitioner was removed under that order. Pet. App. 7.

Petitioner subsequently reentered the United States without inspection. In November 2001, petitioner married a United States citizen. Petitioner applied for adjustment of status to that of lawful permanent resident on the basis of her marriage. Petitioner's application, including her fingerprints, were forwarded to the FBI for a routine criminal check. The FBI's examination of petitioner's fingerprints revealed that her fingerprints matched those taken in connection with the removal order against her entered on March 2, 1998, when she was using the name Ivette Treviso-Frias. In March 2004, the government denied petitioner's application for adjustment of status based on her false claim of citizenship in 1998. Pet. App. 6-7.

On April 26, 2004, the government reinstated petitioner's 1998 removal order pursuant to 8 U.S.C. 1231(a)(5), on the ground that petitioner had illegally reentered the country after having previously been removed under that prior order. Petitioner then filed both a petition for review in the court of appeals and a habeas

corpus petition in the United States District Court for the Western District of Missouri. Pet. 3-4.

3. The court of appeals denied the petition for review. Pet. App. 5-14. The court rejected petitioner's challenge to the comparison of fingerprint evidence that had led the government to conclude that petitioner had previously been removed in 1998, when she was using the name Ivette Treviso-Frias. The court explained that there was "no record support for [petitioner's] speculative contentions." *Id.* at 8-9. The court concluded that "substantial evidence on the administrative record as a whole supports [the government's] decision to reinstate the March 2, 1998 removal order and remove [petitioner] as an illegal reentrant." *Id.* at 10.

The court of appeals also rejected petitioner's argument that she had lacked an adequate opportunity to create a record for judicial review. The court explained that, after the FBI compared the fingerprint evidence and reported that petitioner's fingerprints matched those connected with the March 2, 1998, removal order entered against her when she was using the name Ivette Treviso-Frias, petitioner made "no written statement or motion * * * requesting additional process and explaining why it would produce a different result." Pet. App. 13. The court observed that, although petitioner had been "given a meaningful opportunity to raise and contest the identity issue," she had "submitted nothing in the nature of an offer of proof demonstrating that, with more process, she would prevail in the face of the substantial identity evidence furnished * * * by the FBI." *Id.* at 14. The court therefore concluded that petitioner had failed to establish prejudice in connection with her due process claim. *Ibid.*

Finally, the court of appeals ordered that, pursuant to the REAL ID Act (which was enacted while the petition for review was pending in the court of appeals), the habeas petition that petitioner had filed in the district court should be transferred to the court of appeals for treatment as a petition for review. Pet. App. 10 n.5; see REAL ID Act § 106(c), 119 Stat. 311.

4. After the habeas petition was transferred to the court of appeals, the court of appeals dismissed the petition. Pet. App. 1-3. Petitioner argued that her habeas petition was not subject to the REAL ID Act's general requirement that a habeas petition pending in district court on the date of the REAL ID Act's enactment be transferred to the court of appeals and treated as a petition for review. Petitioner based her argument on the fact that her prior removal order had been issued under the expedited procedures provided for by 8 U.S.C. 1225(b)(1), and that the REAL ID Act's elimination of habeas corpus review does not apply to expedited removal orders entered pursuant to that provision, see 8 U.S.C. 1252(a)(1) and (e)(2).

The court of appeals rejected petitioner's argument, explaining that the "flaw in [petitioner's] contention is that it improperly equates the initial removal order issued under § 1225(b)(1) with the order reinstating that removal order issued under § 1231(a)(5)." Pet. App. 2. The court observed that, when a prior removal order is reinstated pursuant to Section 1231(a)(5), the prior order "is not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5). Pet. App. 2. The court concluded that the availability of restricted habeas review of expedited removal orders entered under 8 U.S.C. 1225(b)(1) therefore does not apply to the reinstatement of such orders under Section 1231(a)(5). In that event, the court

explained, the "sole and exclusive" means of judicial review is by way of a petition for review of the order that reinstates the prior order. Pet. App. 3. Because petitioner had already received that form of review in connection with the court of appeals' previous denial of her petition for review, the court dismissed the habeas petition. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is unwarranted.

1. The court of appeals correctly determined that, pursuant to the REAL ID Act, the habeas petition filed by petitioner should be transferred to the court of appeals and treated as a petition for review. Petitioner errs in contending (Pet. 6-10) that, notwithstanding the REAL ID Act, the district court retained jurisdiction over her habeas petition. Petitioner relies on the fact that her prior removal order had been entered pursuant to the expedited procedures set forth in 8 U.S.C. 1225(b)(1). She contends that, because the REAL ID Act's elimination of habeas corpus review does not apply to removal orders entered pursuant to 8 U.S.C. 1225(b)(1), see 8 U.S.C. 1252(a)(1) and (e)(2), the district court retained jurisdiction over her habeas petition.

As the court of appeals correctly explained, Pet. App. 2-3, petitioner's argument fails to account for the fact that her prior removal order was reinstated pursuant to 8 U.S.C. 1231(a)(5). That provision prescribes that, when a prior order of removal is reinstated against an alien who has illegally reentered the country after having previously been removed under that order, the "prior order of removal * * * is not subject to be-

ing reopened or reviewed." 8 U.S.C. 1231(a)(5); see *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2426 (2006) (observing that Section 1231(a)(5) "explicitly insulates the removal orders from review"). Nothing in the provisions that allow for habeas corpus review of removal orders entered pursuant to 8 U.S.C. 1225(b)(1), see 8 U.S.C. 1252(a)(1) and (e)(2), suggests that habeas corpus review remains available even in a case involving reinstatement of a prior removal order pursuant to 8 U.S.C. 1231(a)(5). Although habeas corpus review of a removal order entered pursuant to 8 U.S.C. 1225(b)(1) generally remains available, when such an order is reinstated against an alien who illegally reenters the country, the prior order, under the plain terms of the reinstatement statute, "is not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5).[1]

---

[1] In arguing that habeas review of her prior removal order remains available, petitioner contends (Pet. 10) that such review would permit her to develop her claim of disputed identity—*viz.*, that she was not the subject of the March 2, 1998, removal order entered against Ivette Treviso-Frias. As the court of appeals explained, however, petitioner was "given a meaningful opportunity to raise and contest the identity issue" as part of the reinstatement proceedings, but "the record contains no written statement or motion by [petitioner] requesting additional process and explaining why it would produce a different result." Pet. App. 13-14. The court of appeals rejected "any challenge to the fingerprint evidence relied upon by [the government] in making its identity determination," and concluded that "substantial evidence on the administrative record as a whole supports [the] decision to reinstate the March 2, 1998, removal order." *Id.* at 10. Petitioner does not challenge that conclusion or explain how a habeas proceeding in the district court could produce any contrary result. See 8 U.S.C. 1252(d) ("A court may review a final order of removal only if * * * another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided

2. Contrary to petitioner's contention (Pet. 9), the court of appeals' decision does not conflict with the Fifth Circuit's decision in *Ramirez-Molina* v. *Ziglar*, 436 F.3d 508 (2006). That case did not concern a prior removal order entered pursuant to the expedited procedures set forth in 8 U.S.C. 1225(b)(1), and did not address whether habeas corpus review of such an order remains available in a case in which the order is reinstated against an illegal reentrant pursuant to 8 U.S.C. 1231(a)(5).

Ramirez-Molina concerned an alien who had been removed under a removal order that was entered after an immigration hearing, not after expedited proceedings conducted pursuant to 8 U.S.C. 1225(b)(1). The alien subsequently reentered the country illegally, and his prior removal order was reinstated pursuant to 8 U.S.C. 1231(a)(5). See 436 F.3d at 510-511. The alien then filed a habeas petition challenging his prior removal order and the reinstatement of that order. While the habeas case was pending on appeal, the REAL ID Act was enacted. The court of appeals determined that, in light of the REAL ID Act's prescription that pending habeas proceedings be transferred to the courts of appeals and treated as proceedings on a petition for review, the pending habeas appeal should be converted into a proceeding on a petition for review. See *id.* at 511-513. That result is fully consistent with the court of appeals' decision below.[2]

---

by the prior proceeding was inadequate or ineffective to test the validity of the order.").

[2] In *Ramirez-Molina*, the Fifth Circuit also held that Section 1231(a)(5)'s explicit bar against review of a prior removal in a reinstatement case did not preclude the court from reviewing a legal or constitutional challenge to the prior order. See 436 F.3d at 513-514. The court relied on 8 U.S.C. 1252(a)(2)(D), which, as amended by the REAL

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

SEPTEMBER 2006

ID Act, provides that no provision of the INA "which limits or eliminates judicial review * * * shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." § 106(a)(1), 119 Stat. 310. That provision does not assist petitioner. Petitioner has already received judicial review in the court of appeals of her petition for review, and her allegation is that she should also receive habeas corpus review in the district court. Nothing in 8 U.S.C. 1252(a)(2)(D) or in *Ramirez-Molina* supports that claim.